87-714

Supreme Court, U.S.
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Case No.

In The Supreme Court of The United States

October Term, 1987

In re Barbara J. Branson, Petitioner

ON EXTRAORDINARY WRIT OF MANDAMUS
OR IN THE ALTERNATIVE
ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petition

Barbara J. Branson
Petitioner, Pro Se
7131 Owensmouth Avenue, No.D-110
Canoga Park CA 91303 No Phone
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10 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Was it the duty of the Court of Appeals to limit its review to the first amended complaint, to accept as true the material allegations therein, to construe them in the light most favorable to petitioner, and to give some explanation of deficiencies if it appeared to a certainty that no relief could be granted under any set of facts that could be proved in support of petitioner's claims; and did the Court exercise such proper appellate jurisdiction in petitioner's appeal?

2. Was it the duty of the Court of Appeals to address petitioner's first issue on appeal regarding the alleged destruction of her property interest in procedural due process, and review it under the *Logan* analysis; and did the Court exercise such proper appellate jurisdiction in petitioner's appeal?

3. Was it the duty of the Court of Appeals to address petitioner's third issue on appeal, dealing with judicial immunity, on the basis of the material facts plead in the first amended complaint in which petitioner alleged that the judge acted without the jurisdiction of his court; and did the Court exercise its proper appellate jurisdiction on this issue in petitioner's appeal?

* * *

LIST OF PARTIES

Respondents:

UNITED STATES COURT OF APPEALS, NINTH CIR.

JOHN F. KILKENNY, Circuit Judge

JOSEPH T. SNEED, Circuit Judge

DIARMUID F. O'SCANNLAIN, Circuit Judge

Real Parties in Interest

(or Respondents under Certiorari):

COUNTY OF LOS ANGELES

MICHAEL D. ANTONOVICH, Supervisor

DEANE DANA, Supervisor

KENNETH F. HAHN, Supervisor

PETER F. SCHABARUM, Supervisor

EDMUND D. EDELMAN, Supervisor

ROBERT H. PHILIBOSIAN, District Attorney

JAMES A. BASCUE, Chief Deputy D.A.

BILLY D. WEBB Director Branch & Area Operations, D.A.

ANN BURNETT, Employee Relations, D.A.

ERNEST E. GOODMAN, Civil Service Comm'n.

N. KEITH ABBOTT, Civil Service Comm'n

GEORGE S. NOJIMA, Civil Service Comm n.

TOM SALATA, Civil Service Comm'n.

CECILIA M. SANDOVAL, Civil Service Comm'n.

JOHN C. BOLLENS, Civil Service Comm'n.

ARNOLD L. FABER, Hearing Officer CSC

JOHN H. LARSON, Former County Counsel

DEWITT W. CLINTON, County Counsel

JOE BEN HUDGENS, Deputy County Counsel

MARK H. BLOODGOOD, Auditor-Controller

NORMAN L. EPSTEIN, Superior Court Judge

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* * *

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

IN RE

BARBARA J. BRANSON, PETITIONER

ON EXTRAORDINARY WRIT OF MANDAMUS

OR IN THE ALTERNATIVE

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PETITION

Barbara J. Branson respectfully petitions this Court to issue a writ of mandamus to require the United States Court of Appeals for the Ninth Circuit to carry out its duty in following proper appellate review procedure according to its own established case precedents and that of this Court; or in the alternative, petitioner petitions for a writ of certiorari to review the decision of the Court of Appeals which conflicts with material allegations in the complaint

and virtually ignores petitioner's appellate briefs (opening and reply) and the facts presented in the record on appeal from petitioner's perspective. Federal relief is not available from any other court. The state has already violated petitioner's federal rights and any relief whatsoever that may be forthcoming from a state action is irrelevant at this point regarding the federal violations. Petitioner is entitled to a supplementary and independent federal remedy which is being arbitrarily denied.

OPINIONS BELOW

The opinion below is an unpublished memorandum by the United States Court of Appeals for the Ninth Circuit, Circuit Judges Kilkenny, Sneed, and O'Scannlain (see Appendix A) affirming the judgments of the district court (1) dismissing the original complaint without leave to amend as regards UNITED PACIFIC for failure to state a claim

(see Appendix B), and (2) dismissing the first amended complaint without leave to amend as regards all defendants[1] for failure to state a claim, failure to set forth a short plain statement of the claims, and failure to state with particularity the circumstances constituting fraud and conspiracy (see Appendix C). Petitioner's timely request for rehearing was denied on June 23, 1987 (see Appendix D).

JURISDICTION

The memorandum opinion of the Court of Appeals (App. A) was filed April 29, 1987 and is final by its terms. A timely petition for rehearing and rehearing en banc was denied June 23, 1987 (App. D). The jurisdiction of this Court is invoked under Title 28 U.S.C. 1651(a) for the extraordi-

[1]Note that UNITED PACIFIC was dismissed March 26, 1986, after it was already dismissed by the court on October 2, 1985 without leave to amend (App B).

nary writ of mandamus, or in the alternative under Title 28 U.S.C. 1254(1) for the writ of certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fifth Amendment (Due Process Clause);

Fourteenth Amendment (Due Process Clause);

Title 42 U.S.C. §1983;

Fed.Rule Civ.Proc. 12(b)(6);

Fed.Rule Civ.Proc. 15(a);

Fed.Rule Civ.Proc. 56(c) and (g).

The relevant portions are quoted in Appendix E.

STATEMENT OF THE CASE

Petitioner filed her original complaint in district court on April 8, 1985, demanding a jury trial, under Title 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, invoking the jurisdiction of the court under Title 28 U.S.C. §§ 1331 and 1343 [Doc.1], after hav-

ing been denied a postdeprivation hearing on the cause of discharge from civil service employment by the County of Los Angeles (i.e., denied an administrative remedy); and then denied judicial relief thereon by the State court system, i.e., the Los Angeles County Superior Court, the California Court of Appeal, and the California Supreme Court (i.e., the destruction of petitioner's vested and protected property interest in the administrative remedy -- now a federal violation of petitioner's liberty interest).[2]

The district court dismissed the original complaint as regards defendant UNITED PACIFIC for failure to state a claim, without leave to amend, and as to all other defendants with leave to amend. [App.B].

2. This destruction of petitioner's property interest is referred to as a "Logan" violation, entitling her to a federal remedy. See *Logan v. Zimmerman Brush Co.* 455 U.S. 422. *Logan* was never addressed by the district court or the Ninth Circuit, although it lies at the heart of petitioner's federal claims.

Petitioner then filed her first amended complaint on December 2, 1985, demanding a jury trial, under Title 42 U.S.C. §§ 1981, 1983, 1988, invoking the same jurisdiction as the original complaint. [Doc.30] At the time of filing the first amended complaint, petitioner had been impeded by the court from being able to adequately prepare her amended complaint as instructed by the judge, as petitioner had not yet received the court transcript of September 16, 1985 containing such instructions. Petitioner filed a declaration concurrently with the first amended complaint explaining the lack of said transcript and being forced to file the amended complaint without the benefit of the court's instructions for guidance, and therein requested the judge to take judicial notice of the problem and to take it into consideration when ruling on the sufficiency of the amended complaint. [See the opening appellate brief, p.31]. The district judge continued

the hearing due to the lack of the transcript of the prior proceeding.[3]

Despite having continued the matter due to the lack of the transcript, the district judge failed to take into consideration the fact that the first amended complaint had to be prepared without the transcript, and hence without the judge's statement of deficiencies of the original complaint,[4] petitioner having

3. The district judge continued the hearing because he said "I don't want you to go up on appeal and say you were handicapped because you didn't have the transcript." (Rep.Tr.2/24/86 p.8) However, even after continuing the matter, the judge still didn't consider the fact that the first amended complaint was prepared without the benefit of the court's instructions on pleading contained in that transcript and he dismissed the amended complaint simply based on "I just have the feeling that you can't file a complaint that will not be subject to the same problems." (Rep.Tr.3/10/86 p.47; see opening brief p.35).

4. "The requirement that courts provide a pro se litigant with notice of the deficiencies in his or her complaint helps ensure that the pro se litigant can use the opportunity to amend effectively. Without the benefit of a statement of deficiencies, the pro se litigant will likely repeat previous errors. ... Amendments that are made without an understanding of underlying deficiencies are rarely sufficient to cure inadequate pleadings." *Noll v. Carlson* (CA9 1987) 809 F.2d 1446, 1448.

to rely solely on her memory in preparing the amended complaint.

The district judge dismissed the entire first amended complaint (92 counts) against all 22 defendants, including a second dismissal of UNITED PACIFIC,[5] without leave to amend based on the district judge's "feeling" that an adequate complaint could not be filed. [See Fn.3][6] The order of dismissal [App.C]

5. Despite the fact that UNITED PACIFIC was already dismissed without leave to amend (App.B; see Fn.1), it was again dismissed because the first amended complaint failed to state a claim against said defendant and UNITED PACIFIC was not named therein. (App.C). Of course, UNITED PACIFIC wasn't named--it was no longer a defendant. (See opening appellate brief p.14)

6. "The trial court's refusal to allow amendment must be based on valid ground in order to withstand the test for abuse of discretion. While not exhaustive, the more common reasons for denying leave to amend are that the amendment will result in undue prejudice to the other party, is unduly delayed, or is not offered in good faith." *Moore's Fed.Prac. 1986 Rules Pamphlet, Pt.1 p.163.* Petitioner finds no authority stating that the judge's "feeling" is a valid ground for refusing to allow amendment. On the contrary, "A pro se litigant must be given leave to amend his or her complaint unless it is 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" *Broughton v. Cutter Laboratories,* (CA9 1980) 622 F.2d 458, 460.

failed to provide a statement of the deficiencies of the first amended complaint to show conclusively that it could not have been cured by further amendment.[7]

Petitioner filed a timely notice of appeal on April 7, 1986 [Doc.60] and on April 29, 1987, the Court of Appeals for the Ninth Circuit filed its unpublished memorandum opinion [App.A] affirming the dismissal of all 92 counts against all 22 defendants, without leave to amend. The memorandum conflicts with material allegations in the first amended complaint, ignores the issues raised on appeal, ignores

7. See Fn.4. "(W)hen dismissing a pro se complaint for failure to state a claim, district courts need draft only a few sentences explaining the deficiencies. ... When the district court dismissed Noll's second amended complaint and the action without leave to amend, it failed to provide a statement of the complaint's deficiencies. Because it is not absolutely clear that Noll could not amend his complaint to allege constitutional violations, the district court erred by not notifying Noll of the amended complaint's deficiencies and allowing him leave to amend. See *Franklin (v. Murphy)* 745 F.2d at 1228, n.9; *Potter (v. McCall)* 433 F.2d at 1088." *Noll v. Carlson, supra,* 809 F.2d at 1449.

the facts stated in the opening and reply appellate briefs and cited to the record, and ignores all of petitioner's citations to law. The memorandum consists of matters unrelated to an examination of the sufficiency of the first amended complaint under the standard of review established for dismissals for failure to state a claim, and indeed states as FACT matters that actually conflict with the record itself. The memorandum recites false accusations, false premises, and unfounded assertions which are at best affirmative defenses on behalf of respondents and real parties in interest--perhaps meeting, but not overcoming, petitioner's allegations in the first amended complaint. It is this memorandum decision

(to page 11)

of the Court of Appeal, by Circuit Judges Kilkenny, Sneed, and O'Scannlain for the Ninth Circuit [App.A] which is the subject for review by this Court and the defects of which memorandum are discussed in detail in the argument which follows.

A timely petition for rehearing and suggestion for rehearing en banc was denied by order filed June 23, 1987 [App.D] which has effectively left unaddressed the substance of petitioner's entire appeal.

REASONS FOR GRANTING THE WRIT (ARGUMENT):

1. To compel the Court of Appeal to perform its duty to exercise its proper appellate jurisdiction in reviewing petitioner's appeal under the standards of review established for a dismissal for a failure to state a claim.[8]

8. The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court

The first question presented to this Court brings to issue the duty of the Court of Appeals to apply the proper standard of review to petitioner's appeal. The record shows that the appeal is from orders of dismissal for failure to state a claim. [App.B, App.C] Such a dismissal is authorized under Federal Rule of Civil Procedure 12(b)(6).[9] The Ninth Circuit has well established the standard of review for dismissals of this type.[10] This standard is recog-

to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to so do. (citations). *Roche v. Evaporated Milk Assn.*, (1943) 319 U.S. 21, 26; *Will v. United States*, (1967) 389 U.S. 90, 95.

9. Pertinent portion of Rule 12(b)(6) states: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted...."

10. "We review de novo a dismissal for failure to state a claim pursuant to Fed.R.Civ.P 12(b)(6). *Shah v. County of Los Angeles*, 797 F.2d 743, 745 (9th Cir. 1986); *Guillory v. County of Orange*, 731 F.2d 1379,

nized and followed by all circuits in the nation,[11] meeting the requirements established by this Court.[12]

Rule 12(b)(6) also permits a motion to

1381 (9th Cir 1984). Our review is limited to the contents of the complaint. *North Star Int'l v. Arizona Corp. Com.*, 720 F.2d 578, 581 (9th Cir 1983). To uphold a dismissal of this type, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proven. *Halet v. Wend Inv. Co.* 672 F.2d 1305, 1309 (9th Cir 1982). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *North Star*, 720 F.2d at 580." *Sax v. World Wide Press Inc.*809 F.2d 610, 613.

11. (D.C. Cir 1986) *Washington v. District of Col.* 802 F.2d 1478, 1479; (1st Cir 1987) *Chongris v. Bd. of appeals etc.* 811 F.2d 36, 37; (2d Cir 1987) *Costello v. Town of Fairfield*, 811 F.2d 782, 784; (3d Cir 1987) *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 83 n.1; (4th Cir 1987) *Guy v. Travenol Laboratories Inc.*, 812 F.2d 911, 912; (5th Cir 1987) *Roe v. Abortion Abolition Inc.*, 811 F.2d 931, 933; (6th Cir 1986) *Graham v. National Collegiate etc.*, 804 F.2d 953, 957; (7th Cir 1987) *Gomez v. Illinois State Bd. of Ed.*, 811 F.2d 1030, 1032; (8th Cir 1986) *Stephens v. Assoc. Dry Goods Corp.*, 805 F.2d 812, 814; (9th Cir 1987) *Sax v. World Wide Press Inc.*, 809 F.2d 610, 613; (10th Cir 1986) *Morgan v. City of Rawlins*, 792 F.2d 975, 978; (11th Cir 1986) *Little v. City of North Miami*, 805 F.2d 962, 964.

12. E.g. *Conley v. Gibson*, 355 U.S. 41; *Hospital Bldg. Co. v. Trustees of the Rex Hospital*, 425 U.S. 738; *Kugler v. Helfant*, 421 U.S. 117.

be treated as one for summary judgment[13] and disposed of as provided in Rule 56.[14] The final sentence of subparagraph (b) of Rule 12 states "and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." It is apparent from the record that petitioner's opponent (hereinafter referred to as "the County") was attempting to convert the dismissal into a summary judgment

13. Pertinent portion of Rule 12(b)(6) states: "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

14. Pertinent portion of Rule 56 states: "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ..."

by ignoring petitioner's issues and bringing in matters pertaining to tax levies. [See appellee's brief and supplemental excerpt on appeal]. Of significance was the declaration of Arthur Allen submitted by the County which petitioner specifically opposed on the record.[15] Petitioner attached exhibits to her supplemental opposition to the County's motion [Doc.52] to show that Mr. Allen's declaration cannot stand on its

15. "The declaration of Arthur Allen should be either voluntarily withdrawn by defendant County or expressly excluded by this court. ¶In view of the above circumstances, as shown by the attached exhibits (A & B), the declaration of Arthur Allen, submitted as an exhibit to the County's motion to dismiss, serves no valid purpose to this motion. The Federal Levy, information of which had been withheld from plaintiff prior to the filing of this federal action, cannot now be used as evidence against plaintiff herein. Matters regarding the State Withholding Order are issues that remain to be litigated, and plaintiff is entitled to have this, and all issues, tried by jury. ¶Therefore, in the interest of justice, and in an effort to avoid expansion of this already complex, serious, and burdensome federal action, the declaration of Arthur Allen should be permanently foreclosed regarding the Federal Levy, and expressly excluded by this Court from consideration of the County's motion to dismiss." (Doc.#52 pp 7-8)

own under the evidence on record.[16] Nevertheless, the Ninth Circuit, apparently relying on that declaration, made statements in its memorandum [App.A] that are false and

16. Petitioner submitted exhibits in opposition to Mr. Allen's declaration, which were part of the record on appeal before the Ninth Circuit, showing that Judge Epstein in Superior Court (part of the extensive judicial review of the administrative proceedings --long after the "Logan" violation had already occurred) was questioning the validity of the tax levies. Judge Epstein: "Miss Branson said--and I don't think it was controverted -- that the County was honoring the garnishment by taking out in effect larger and larger amounts of her paycheck ... and eventually it was everything. ...So my question is how it is...that the County took out more than 25 percent of the disposable income in her salary check?" County Counsel responded "I do not know that that is true, your honor, and I don't really know what happened." (Doc.52 p.41) That questioning took place on May 8, 1985. At the supplementary proceeding, on June 10, 1985, Judge Epstein stated: "I believe a question remains as to whether the discipline is justified in this case with that short cut...of not having a full hearing. ¶I have looked at the material that has come back. (The material includes the declaration of Arthur Allen). The material that I had before me then was replete with references... to the Garnishment by the Franchise Tax Board, and that petitioner had ample notification of that situation. But this was the first time that I recall seeing the references to a federal garnishment in addition. ..." (Doc.52 pp 38-39)

fraudulent, and known to be so when made. [17] The appellate court then went on to analyze tax law in purporting to address the merits of the appeal. [App.A pp A-5, A-6]. Clearly from the record (e.g. Fn.16) and from the evidence cited in petitioner's reply brief on appeal discussing the inapplicability of summary judgment at the pleading stage of this case (pp 1-16), it can be seen that the Ninth Circuit is covering up the County's concealment of the federal tax levy and ignoring the fact of the destruction of petitioner's property interest in procedural due process to which she was legitimately entitled according to law. Even petitioner's

17. The appellate court stated under FACTS: "...Both the State of California and the United States, through their appropriate agencies, ordered tax levies on Branson's wages. She did not believe she owed the taxes; the County, however, complied with the levy orders. Being deprived of a portion of her salary as a result of these levies, Branson refused to work. ..." [App.A p.A-2] (Cf. Fn.16) The evidence on the record shows that the federal tax levy had been concealed from petitioner. (See pp 11-13 of petitioner's reply brief on appeal).

offers of proof of the false information presented by the County [18] did not deter the Ninth Circuit from maliciously relying on that information and fraudulently using it against petitioner.

The standards for review are well established [see Fns. 10, 11] and it is the duty of the appellate court to follow legal precedent under the doctrine of "stare decisis" in de novo review of questions of law.[19] The

18. "Appellant specifically reserved her right to request sanctions pursuant to FRCP 56(g), stating the following: ¶In the event that such declarations, affidavits, and other documents are not excluded by this Court, and they are considered in a motion for summary judgment, plaintiff will show that such documents are patently false, are based on false pretenses and misrepresentations of the truth, and are submitted maliciously and in bad faith for purposes of harassment and vexation of plaintiff and to further delay and hinder the commencement of meaningful litigation in this case. In such event, plaintiff reserves her right to request sanctions pursuant to Rule 56(g), or any other applicable rule, and will submit a statement of the amount of reasonable expenses which the filing of such documents caused her to incur. However, until the happening of such event, plaintiff does not address those matters. (DOC.#45 p.34)" (Reply Brief on appeal pp 2-3).

19. De novo review of questions of law...is dictated by still another concern..Under the doctrine of stare

starting point in determining the scope of appellate review is the order being appealed. (See petitioner's reply brief on appeal p.1). Had the appellate court looked to the order being appealed [App.C] as its starting point in petitioner's case, the court would have found the defects discussed in Fns. 3 through 7, ante. The court would have seen that petitioner was forced to prepare the first amended complaint without the benefit of the judge's statement of deficiencies, as described on page 6, ante. The court would have further seen that the district court refused to take that fact into consideration when reviewing the first amended complaint. The district judge ignored and further dismissed en toto his complicity in hampering

decisis, appellate rulings of law become controlling precedent and, consequently, affect the rights of future litigants.... From the standpoint of sound judicial administration, therefore, it makes sense to concentrate appellate resources on ensuring the correctness of determinations of law. *United States v. McConney* (CA9th en banc 1984) 728 F.2d 1195, 1201.

the efforts of petitioner in her ability to prepare a first amended complaint. The judge relied on his "feeling" (instead of reason, logic, and common sense demanded by the discipline of the law) that a satisfactory complaint could not be submitted by petitioner, failing to even draft a few sentences explaining the deficiencies of that complaint in his order of dismissal. [See Fn.7]. Petitioner's opening appellate brief fully set forth the many administrative errors and abuses of the district judge in his arbitrary and capricious handling of this case.

Rather than look to the lower court's order(s) and petitioner's opening brief to set the initial climate of the appeal, the appellate court looked to the County's position exclusively and based its decision on it. Even when considering the County's position in the first instance in this appeal, the materials presented by declaration or affi-

davit for the possibility of a summary judgment disposition, are to be examined by the court against the record to see if the material is genuine[20] and supported by the undisputed facts of the case. Petitioner has already shown that by the evidence in the record the material presented by the County is not genuine[21] [See Fn.16]. Petitioner reserved her right to present her opposition to the materials presented by the County in the event the district court intended to consider them as a motion for summary judgment. [Fn.18] Petitioner was ready, willing, and able to present a counter-declaration to show that the material presented by the

20. "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial." *Richard v. Credit Suisse*, 242 NY 346, 152 NE 110 (cited in *Moore's Fed.Prac. 1986 Rules Pamphlet, Pt.1 p.559*).

21. The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. See *Bell v. Cameron Meadows Land Co.*, (CA9th 1982) 669 F.2d 1278.

County was false and submitted in bad faith and petitioner was planning to request sanctions under Rule 56(g)[22] upon being informed by the court that summary judgment based on the County's presentation was being considered. However, the record shows that the district court did not notify petitioner of such consideration, and therefore, petitioner was not alerted to the need for any counter-affidavits.[23] By using and relying

22. Rule 56(g) states: "Affidavits Made In Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

23. In *Yusuf Asad Madyan v. Thompson* (CA7th 1981) 657 F.2d 868, summary judgment was granted for defendants when pro se prisoner plaintiffs failed to file opposing affidavits as required by Rule 56(e). Reversing, the court of appeals held that the district court erred in granting the motion without first alerting plaintiffs to the need for counter-affidavits. Adequate knowledge of the right and the necessity of filing counter-affidavits under Rule 56(e) is critical to the pro se litigant's access to a just disposition on the merits.

on the County's material dispositively against petitioner in disposing of her entire federal case without adjudication (and especially when a jury trial was demanded), the Court of Appeals tendered its memorandum decision [App.A] equally in bad faith based upon false pretenses and misrepresentations, and it was done knowingly, intentionally, and maliciously. [See Fn.18] By so doing, knowing that petitioner had not been alerted to the need for any counter-affidavits that she was prepared to submit, the Court of Appeal maliciously denied petitioner access to a just disposition on the merits. [Fn.23]

This usurpation of power by the Court of Appeals, denying petitioner the very basic right of access to a trial on the merits of her case before a jury, presents the exceptional circumstances that will justify the extraordinary remedy.[24]

24. "(E)xceptional circumstances amounting to a judicial 'usurpation of power' will justify the invo-

Had the Court of Appeals reviewed petitioner's appeal in good faith, it would have acknowledged that summary judgment would not be an appropriate disposition in this case based on the evidence shown by the record. The order of dismissal [App.C] did not discuss summary judgment, and therefore, the appeal was to have been treated as from an order of dismissal under Rule 12(b)(6), for failure to state a claim. The Ninth Circuit has outlined the standard for such review in Sax v. World Wide Press (cited in Fn.10]. The review should have been limited to the contents of the complaint. The Court of Appeals lightly brushed over the fact that a complaint existed by stating "Branson submitted an amended complaint against all parties, except United Pacific, alleging substantially the same violations as did the

cation of this extraordinary remedy." *DeBeers Consol. Mines Ltd. v. United States* 325 U.S. 212, 217; *Will v. United States*, 339 U.S. 90, 95.

initial complaint." [App.A p.A-4] Nothing was discussed about the sufficiency of the complaint from a pleading standpoint. Petitioner orally argued in open court the issue regarding the pleading of necessary elements to state a cause of action, or claim. This issue was briefed in the opening brief, pp 33-34, showing that the oral argument appeared in the March 10, 1986 transcript on pages 37-41.

All allegations of material fact were to be taken as true and construed in the light most favorable to petitioner (the nonmoving party). Nevertheless, the Ninth Circuit made statements in its memorandum that actually conflict with allegations in the first amended complaint, such as "Branson seeks to convert a dispute growing out of her discharge...into a federal case under 42 USC §1983." [App.A p.A-1] The complaint alleges the violation of procedural due process in the discharge proceedings themselves. Peti-

tioner has been denied a hearing on the cause of her discharge, required by law, at which any disputes growing out of the discharge could be adjudicated. The violation of procedural due process in a discharge from civil service is a federal violation. Petitioner was not "seek[ing] to convert" anything; the federal claim was alleged. Another statement, "Being deprived of a portion of her salary as a result of these levies..." [App. A p.A-2] conflicts with the allegation that petitioner's entire salary was seized without authority in violation of the Fourth Amendment. The County's claim that it complied with any levy orders would amount to an affirmative defense to be pled by answer. Another statement, "Branson made no showing that state remedies are inadequate" [App.A p.A-6] conflicts with the allegations in the complaint that the state refused to provide a remedy as prescribed by its discharge procedures, and having so refused violated

procedural due process that is protected under the Fourteenth Amendment. Such a violation is a substantive due process violation of liberty and is a valid federal claim, regardless of any concurrent state remedy that may also exist. And another statement (and these examples are not exhaustive), "Judges are immune from damage actions for judicial acts taken within the jurisdiction of their courts" [App.A, p.A-8] conflicts entirely with the allegation that Judge Epstein acted outside the scope of the jurisdiction of his court. To simply negate an allegation is to merely bring the matter to issue for trial-- it doesn't overcome the allegation.

It must appear to a certainty that petitioner (plaintiff) would not be entitled to relief under any set of facts that could be proven. The Court of Appeals stated "Branson has conclusively demonstrated that a second amended complaint would be both futile and vexatious." [pp A-8, A-9] Such statement can

be made only upon the false and fraudulent misrepresentations contained in the memorandum decision. Without starting appellate review on the proper threshold, and limiting its review to the established guidelines, any conclusion reached is bound to be distorted.

In eliminating the Branson case entirely and avoiding a trial on the merits, the Court of Appeals has disregarded the spirit of the Rules and case precedent, and even the facts of the case itself. By so doing, the Court has failed to do that justice which it is by duty and by virtue of its office, bound to do.[25]

The determination of whether or not it appears to a certainty that petitioner would not be entitled to relief under any set of facts that could be proven is directly tied

25. "[The writ of mandamus] may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do." *Los Angeles Brush Corp. v. James*, 272 U.S. 701,705.

in with FRCvP Rule 15,[26] the "amendment" rule. Such determination has to be made by basing appellate review in the first instance upon the contents of the order being appealed. In petitioner's case, the Court of Appeal did not do so, but instead based its review upon the material presented by the County (petitioner's opponent). Had the Court of Appeal based its review on the order of dismissal in the first instance, it would have seen that petitioner's first amended complaint was dismissed without leave to amend without stating in what respects petitioner's complaint failed to state a claim.

26. Rule 15 states in pertinent part:
"(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. ..."

Without this explanation by the lower court, nor such explanation by the appellate court upon a de novo review of the issue, it is impossible to determine to a certainty that a claim could not be stated by amendment, or indeed that a claim had not been stated. [See Fns. 4, 6 and 7 ante.][27] The court must state why and how the complaint affirmatively discloses "some insuperable bar to relief".[28] The Ninth Circuit has already established that "mere

27. "The trial court's refusal to allow amendment must be based on valid ground in order to withstand the test for abuse of discretion." (See Fn.6)

28. "The obstacles to affirmance of a dismissal on this ground [failure to state a claim] are formidable. '[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 45-46... Dismissal for insufficiency as a pleading is proper only when the complaint affirmatively discloses 'some insuperable bar to relief.' *Wright, Federal Courts 286 (1963)*. See *Harman v. Valley National Bank*, 339 F.2d 564 (9th Cir.1964), and authorities there cited. Mere vagueness or lack of detail will not justify dismissal. *Id.*, at 567."
Retana v. Apartment, etc. (CA9th 1972) 453 F.2d 1018, 1022. (cited in Doc.45 p.26) [See Reply Brief, p.1]

vagueness or lack of detail will not justify dismissal." [See Fn.28] A reading of the lower court's order of dismissal [App.C] shows that it does not pass those obstacles to affirmance.

Because of the severity of dismissing a federal case without a trial on the merits, and especially when a jury trial has been demanded, as in this case, it behooved the the Court of Appeal to review the transcript of proceedings from which the order of dismissal derived. Had the Court of Appeal taken the care and the time to review the transcript, it would have found that petitioner testified that she would be able to state the necessary elements for an unlawful bill of attainder on amendment, that as far as she could tell, the elements of a civil rights violation have been alleged, and that if further detail was required for the fraud and conspiracy counts, other than what was already in the complaint, petitioner would

be happy to try to accommodate that need. Petitioner stated that she did the best she could under the circumstances (of not having available at the time of preparing the first amended complaint the court's transcript of the previous proceedings containing the judge's explanation of deficiencies of the original complaint). [See Fn.3] Petitioner also stated that she did state a valid cause of action under the Fourth Amendment violations and explained the reasons and elements therefor, and she also explained how and why she had stated a cause of action under the Thirteenth Amendment. That portion of the proceedings then closed with petitioner explaining the valid pendent state claims.[29] It was the duty of the Court of Appeal to acknowledge and review that testimony regarding the sufficiency of petitioner's

29. This testimony is found on pages 37-41 of the Reporter's Transcript of 3/10/86 on appeal. See also the opening appellate brief, pp 33-34.

complaint and to address that issue specifically before making a statement that "Branson has conclusively demonstrated that a second amended complaint would be both futile and vexatious." [App.A p.A-8,9] Footnote 27, ante, should apply also to the Court of Appeal. It, too, must state a valid ground for refusing to allow amendment in order to withstand the test for abuse of discretion.

Not only is the refusal to explain reasons for denying the opportunity to amend an abuse of discretion, it is also inconsistent with the spirit of the Federal Rules[30] which

30. "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Fed. Prac. (2d ed. 1948) ¶¶15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by

is to afford a litigant an opportunity to test his claim on the merits rather than on pleading technicalities.[31] Rule 15 is designed for that purpose and it is particularly important to the pro se litigant.[32] However, when the court is not interested in the spirit of the Rules, as has been demonstrated in petitioner's case, pro se

virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be 'freely given'. Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Forman v. Davis,* 371 U.S. 178, 182.

31."While Fed.R.Civ.P. 15 places leave to amend within the sound discretion of the trial court, we have stressed that a court must remain guided by 'the underlying purpose of Rule 15...to facilitate decision on the merits, rather than on the pleading or technicalities.' *United States v. Webb,* 655 F.2d 977, 979 (CA9th 1981); see also *Conley v. Gibson,* 355 U.S. 41, 48 (1957). " *Noll v. Carlson, supra,* 809 F.2d 1446, 1448.

32. "The rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant. Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel. Indeed, the Supreme Court

litigants, such as petitioner, will be subject to the prejudice against which the Rules were promulgated to protect.[33]

2. To compel the Court of Appeal to perform its duty to address petitioner's first issue on appeal and review it under the *Logan* analysis.

The second question presented to this Court involves petitioner's §1983 claim under the principles set forth in *Logan v. Zimmer-*

has held that allegations of a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner,* 404 U.S. 519, 520-21 (1972) (Per Curiam); see also *Maurer v. Individually and as Members of Los Angeles County Sheriff's Dept.,* 691 F.2d 434, 437 (CA9th 1982); *Gillespie v. Civiletti,* 629 F.2d 637, 640 (CA9th 1980)." *Noll v. Carlson, supra,* 809 F.2d at 1448.

33. "The United States Supreme Court has ruled in *Haines v. Kerner,* 404 U.S. 519... that a pro se plaintiff is not to be held to the same pleading standards as are lawyers. The Ninth Circuit has recognized this position stated in *Haines* in its case of *Sherman v. Yakahi* (CA9 1977) 549 F.2d 1287 which appellant has cited in her opposition to defendant EPSTEIN's motion to dismiss. (Doc.49 pp 20-21). Instead of following the approach of leniency toward appellant, Judge Rea reacted...as follows: THE COURT: I will give you five minutes, ma'am, right now. Go

man Brush Co. 455 U.S. 422, which was the first issue on appeal,[34] and the duty of the Court of Appeals to address that issue under the *Logan* analysis.

The Court of Appeals never even alluded to *Logan* in its memorandum. [App.A] It opened the memorandum by stating: "Branson seeks to convert a dispute growing out of her discharge by the County of Los Angeles into a federal case under 42 U.S.C. §1983. Proceeding pro se, she failed in the district court, and we affirm." [App.A p.A-1,2]

ahead. Then I will make my ruling. MS. BRANSON: Well, I will state that of course I'm under...a lot of pressure here when I -- THE COURT (interrupting): Yes, you are. That's what happens when you're in pro per. You know, you take on a big responsibility. MS. BRANSON: Well, I know. I would request that the leniency under [*Haines v. Kerner*] be granted-- THE COURT (interrupting): Look, I've given you every bit of leniency that I think I can give you. (Rptrs Trns. 3/10/86 pp 43-44)" [See opening brief pp 34-35].

34. The first issue on appeal was: "Is appellant entitled to a damages remedy in the Federal Court, before a jury, when the State Courts have refused to provide a State remedy after ultimately destroying appellant's property interest in the *Logan* sense? (See *Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422)." [See opening brief p.1]

The only other mention of section 1983 in the memorandum is stated as follows: "With respect to the state tax levy, this court should not entertain a section 1983 action challenging that action so long as state remedies are adequate." [App.A p.A-5,6]

When the Court of Appeals starts out on a footing other than the one upon which the appeal is based, its decision is bound to be unrelated and irrelevant to the case before the court. It is the duty of the Court of Appeal to address the legal questions presented to it.[35] The sphere of the court's discretionary power is set in the first instance by the order being appealed, and then is limited to the issues presented on appeal as they are affected by the order. The order determines the type of appeal to be reviewed which, in turn, sets the standard

35. "Courts of appeal sit as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan* (DC Cir 1983) 714 F.2d 171, 177.

of review. In the instant case, as shown by the argument for Question No. 1, ante., the order appealed is a dismissal for failure to state a claim, the standard of review for which is well established across the nation and by the Ninth Circuit. [See Fns. 10, 11 and 12 and text pertaining thereto]. The record does not support a conversion of the dismissal into a summary judgment, as shown by previous argument. Therefore, appellate review is limited to an examination of the first amended complaint to determine its sufficiency from a pleading standpoint, guided by the issues presented on appeal.

However, the Court of Appeals did not follow established procedure in this appeal and instead relied solely upon the County's false and fraudulent misrepresentations, as shown by the record. [See Fns. 17 and 18 and text relating thereto]. By so doing, not only did the Court of Appeal maliciously deny petitioner access to a just disposition

on the merits [see Fn.23], but by ignoring the *Logan* violation which was presented on appeal, the court foreclosed the adjudication of the violation of petitioner's constitutional rights and of the destruction of her protected property interest and deprived petitioner of a trial by jury to vindicate her claims.[36]

Petitioner petitions this Court for an extraordinary writ of mandamus to compel the Court of Appeal to confine its activity in this case to the sphere of its discretionary power[37] and to exercise its duty to address the *Logan* violation with a view toward af-

36."[T]his Court has, by writs issued under §262, reviewed the action of district courts, alleged to be in excess of their authority, by which they have foreclosed the adjudication of rights or the protection of interests committed to the jurisdiction of a state officer or tribunal, (citations) or by which they have deprived a party of a trial by jury. (citations)" *U.S. Alkali Assn. v.U.S.* 325 U.S. 196,204.

37. "[M]andamus is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power. *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379,383. *Will v. United States* (1967) 389 U.S. 90,104.

fording petitioner an opportunity to test her claim on the merits in accordance with the spirit of the Federal Rules. [See Fns. 30 and 31 and accompanying text].

Petitioner filed her first amended complaint under Title 42 U.S.C. §1983[38] alleging the deprivation, under color of state law, of her rights, privileges and immunities secured by the Constitution and laws of the United States, together with pendent state claims. Although petitioner's complaint consists of allegations under all three aspects of Fourteenth Amendment protection,[39] plus allegations of violations of

38. §1983 states, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ..."

39."[The Due Process Clause of the Fourteenth Amendment] is the source of three different kinds of con-

federal law and state pendent claims, petitioner brought up on appeal her foremost federal claim, challenging the established civil service and court procedures as being constitutionally inadequate, i.e., a *Logan* violation. Petitioner alleged possession of a statutorily-granted and constitutionally-protected property interest.[40] This property interest, granted to petitioner upon achieving the status of "permanent employee" in

stitutional protection. First, it incorporates specific protections defined in the Bill of Rights. ... Second, it contains a substantive component, sometimes referred to as 'substantive due process', which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them'. ... Third, it is a guarantee of fair procedure, sometimes referred to as 'procedural due process': the State may not... take property without providing appropriate procedural safeguards." *Daniels v. Williams* (1986) 474 U.S. ____, 106 S.Ct. 677, 678 (J. Stevens, concurring in judgments).

40. "Plaintiff has been employed by defendant COUNTY OF LOS ANGELES, District Attorney's Office thereof, since August 7, 1967, having achieved the status of a permanent civil service employee in the position of Secretary V, and having been granted a statutorily created vested fundamental property interest and legitimate claim of entitlement to the retention of said employment, fully protected by the provision of the United States Constitution and laws in pursuance thereof." (Doc.30 p.2)

civil service employment,[41] is recognized in *Logan*[42] as a right guaranteed by the state to have her grievances of discharge redressed by the appropriate agency (the Los Angeles County Civil Service Commission in petitioner's case) with the adequacy of her claim (i.e., her side of the story) assessed under a "for cause" standard, based upon the substantiality of the evidence.[43] An assessment under a "for cause" standard based upon substantiality of the evidence necessarily

41. "We begin our analysis in the instant case by observing that the California statutory scheme regulating civil service employment confers upon an individual who achieves the status of 'permanent employee' a property interest in the continuation of his employment which is protected by due process." *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 206, 124 Cal.Rptr 14, 539 P.2d 774.

42. "The hallmark of property...is an individual entitlement grounded in state law, which cannot be removed except 'for cause'. (citations)" *Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422,430.

43. "A claimant has more than an abstract desire or interest in redressing his grievance; his right is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a 'for cause' standard, based upon the substantiality of the evidence." *Logan, supra,* 455 U.S. at 431.

translates into: an evidentiary hearing to determine the sufficiency of the cause of discharge. The *Logan* Court established the federal protection under the Due Process Clause of the Fourteenth Amendment as "preventing the States from denying...use of established adjudicatory procedures" in order to hold such a hearing.[44] Consequently, it is that hearing, emphasized above, that is "the hearing required by law" according to federal standards of due process.

To emphasize the fact that this procedural requirement is a matter of federal law, the *Logan* Court further pointed out that it didn't matter if "the State [or County, in petitioner's case] may have specified its own procedures that it may deem adequate for

44. "[T]he Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be the equivalent of denying them an opportunity to be heard upon their claimed right(s)." (citation) *Id.* pp 429-430

determining the preconditions to adverse official action."[45] Therefore, it is well established that the failure of the State, or local government, to hold an evidentiary hearing on the cause of discharge from permanent civil service employment is a uniquely federal cause of action, according to *Logan*.

With *Logan* as the foundation for petitioner's federal claim, the only thing for the Court of Appeals to do is to examine the complaint to see if a *Logan* violation

45. "Each of our due process cases has recognized, either explicitly or implicitly, that because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' (citations) Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach: 'While the legislature may elect not to confer a property interest,...it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. ... [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.' (citations)." *Id.*, 455 U.S. at 432.

under section 1983 had been alleged; or, if not alleged, could it possibly be alleged on amendment according to the record.[46] Not only is summary judgment unsupportable based on the record [see Fn.16 and accompanying text], but it cannot apply unless the record affirmatively discloses that the elements of a *Logan* violation do not exist.[47] As *Logan* has established, petitioner's right to have

46. The narrow scope of review on an appeal from a dismissal for failure to state a claim upon which relief can be granted does not allow us to reach the merits of [any] issue. Our inquiry is limited to the content of the complaint. (citations) ... The purpose of a motion to dismiss under rule 12(b)(6) is to test the legal sufficiency of the complaint. *North Star Int'l. v. Arizona Corp. Comn.* (CA9 1983) 720 F.2d 578, 581.

47. "The *Logan* violation is clear in this case by the uncontroverted facts (1) that appellant was a permanent civil service employee of the County of Los Angeles...and had a property interest in the retention of that employment which could not be taken without due process of law [appellees' brief p.17]; and (2) that the COUNTY and the State..., through its established procedures and legal processes, failed to grant appellant a full evidentiary hearing on the cause of discharge from that employment [appellees' brief pp 17-18]. Those facts alone establish the federal violation by appellees within the meaning of *Logan*." [Reply Brief on appeal, p.5].

her claim[48] assessed under a "for cause" standard, based upon the substantiality of the evidence, is guaranteed by the State[49][by the County in petitioner's case]. This interpretation of the guaranties under the Due Process Clause of the Fourteenth Amendment by the United States Supreme Court, said to "prevent the States from denying use of established adjudicatory procedures"[50] to accomplish the assessment, as aforesaid, is a principle of law that is to be followed by the Court of Appeals in petitioner's case under the doctrine of "stare decisis".[51] Indeed, the principles in *Logan* are recognized and followed by all circuits, includ-

48. Petitioner's claim is that she was justified in engaging in the conduct upon which the charges are based, the charges in this case being "Excessive and unauthorized absenteeism". "The employee may try to avoid the consequences of his actions by showing that he was justified in engaging in the conduct upon which the charges are based. (citation)" *Skelly v. State Personnel Bd., supra,* 15 Cal.3d at 204 n.19.

49. See Fn.43 and accompanying text.

50. See Fn.44 and accompanying text.

51. See Fn.19 and accompanying text.

ing the Ninth.[52]

Petitioner's "Statement of Facts Relevant to Issues Presented" required by FRAP 28(a)(3) in her opening appellate brief carefully details the allegations of her first amended complaint, citing the page numbers of the complaint, DOC #30. After describing the allegation of her property interest, petitioner then discusses the allegations of no hearing granted on the cause of discharge.[52A]

52. (DC Cir.1984) *Silverman v. Barry*, 727 F.2d 1121, 1125; (1st Cir.) *Culebra Enterprises Corp v. Rios*, (DC Puerto Rico) 613 FS 146, 148; (2nd Cir.) *Campo v. NY City Emp. Ret. Sys.* (SDNY 1987) 653 FS 895, 898; (3rd Cir. 1985) *Stana v. School Dist. City of Pittsburgh*, 775 F.2d 122, 125; (4th Cir.1986) *Yates v. Jamison*, 782 F.2d 1182, 1184; (5th Cir.1986) *Gamble v. Webb*, 806 F.2d 1258, 1261; (6th Cir. 1985) *Bacon v. Patera*, 772 F.2d 259, 263; (7th Cir.1984) *Altman v. Hurst*, 734 F.2d 1240, 1242 n.6; (8th Cir. 1985) *Ikpeazu v. University of Nebraska*, 775 F.2d 250, 253; (9th Cir. en banc 1985) *Haygood v. Younger*, 769 F.2d 1350, 1352; (10th Cir.1985) *Wolfenbarger v. Williams*, 774 F.2d 358, 364; (11th Cir. 1987) *Jones v. Previt & Mauldin*, 808 F.2d 1435, 1439.

52A "The complaint alleges that certain COUNTY officials, in bad faith, under COUNTY policies and customs, summarily ousted appellant from her permanent civil service career, and that the Superior Court judge, in collusion with COUNTY counsel, arbitrarily

Petitioner then shows the allegations of the various civil service rules and state statutes (the established procedures) involved and the jurisdictional challenges of the Superior Court judge.[53] Petitioner brought

refused to allow appellant to present her case to a judicial determination of the cause of her discharge (the 'grounds of discipline' as the judge referred to it). [Doc.30 p.25] The complaint alleges that this summary ouster from permanent civil service employment took place on or about December 30, 1983 [Doc. 30 p.22]; that it was affirmed by the Civil Service Commission on or about February 1, 1984 and reaffirmed by them on or about March 7, 1984 [Doc.30 pp 23-24]; that judicial remedy by the Superior Court was denied on or about May 18, 1984 [Doc.30 p.25]; that the Civil Service Commission, while having the ability and resources to do so, deliberately and intentionally refused to exercise their authority in conducting an evidentiary post-termination hearing on the cause of appellant's discharge, misrepresenting to appellant that they had the authority to deny her timely request for such hearing. [Doc.30 p.36]." [Opening Brief on appeal, p.4].

53. "The Civil Service Commission summarily denied appellant's timely request for a full hearing on the cause of discharge, stating no reasons for such denial, and citing Civil Service Rule 4.03(b) in the written notice of denial on or about February 1, 1984. [Doc.30 pp 35-36]; thereafter, on or about February 7, 1984, and March 7, 1984, the Commission continued treating the matter of an 'amended appeal'

to the attention of the Court of Appeals the fact that she has challenged the constitutionality of the civil service rules and state statutes used against her in denying

under the authority of Civil Service Rule 4.03(b), although, as alleged by appellant, no amended appeal was submitted nor was one authorized in a discharge case. [Doc.30 pp 37-39]. ¶That after acting under Rule 4.03(b) in appellant's discharge, as alleged in the complaint and can be shown by the record, the Civil Service Commission represented by COUNTY counsel (personally named), represented in open court and on the record, for the first time at the administrative review level of the proceedings, on or about May 18, 1984, that the Commission was relying on Civil Service Rule 4.03(a) in summarily denying appellant her timely request for a full hearing on the cause of her discharge. [Doc.30 p.41]. COUNTY counsel represented such authority to deny this hearing as the 'appointment rule'. [Doc.30 p.41 and p.43]. The Superior Court, which jurisdiction was invoked by the statutory authority of California Code of Civil Procedure section 1094.6 (limited, and not general jurisdiction), authorized by Civil Service Rule 4.14 of the COUNTY OF LOS ANGELES, did, on or about May 18, 1984, refuse to accept jurisdiction under section 1094.6 and instead treated the proceeding as an 'ordinary writ of mandate' under CCP Section 1085. [Doc.30 p.44]; that the Superior Court, instead of ruling on the subject matter presented, ruled on an issue not raised, and issued a judgment that was void on its face for want of jurisdiction. [Doc.30 p.46]." [Opening Brief on appeal, pp 4-5].

the evidentiary hearing enunciated in *Logan*.[54] The Superior Court judge before whom the constitutional challenges were brought[55] outright refused to rule on those challenges, stating on the State record [Case C492725] that he wasn't there to adjudicate those matters. It is currently pending on a second

54. "Appellant has since filed, on August 20, 1986, in the Superior Court of Los Angeles County, Writs and Receivers Department, a 'Notice of Motion and Motion for Court to Correct and Clarify Its Record By Declaring and Entering As Final Its Judgment Dated June 11, 1984, on the Issue of Denial of Evidentiary Hearing on the Cause of Discharge From Permanent Civil Service Employment; and to Vacate Said Final Judgment on Said Issue as Void on Its Face for Want of Jurisdiction and Constitutionality; and for Damages.' In that motion, appellant challenges the constitutionality of Code of Civil Procedure Section 1085, as applied against her in summarily 'finding' that just cause existed for her discharge when, in fact, all the facts were not known by the parties; appellant is also challenging the constitutionality of the Civil Service Rules that were used against her in denying a full evidentiary hearing on the cause of discharge, as mandated by the federal standard of procedural due process, enunciated in *Logan v. Zimmerman Brush Co.*" [Reply Brief to United Pacific, pp 11-12; this is a separate reply brief].

55. The judge before whom this motion was brought was Judge Warren H. Deering, Los Angeles Superior Court. His only participation was to have the County prepare and submit for signature a judgment that was final in form to be challenged on appeal.

appeal before the California Court of Appeal.[56]

Petitioner then shows the allegations of the complaint regarding the failure of the State court system to provide a viable court remedy for the vindication of her federal constitutional rights[57](i.e., the destruction of her property interest-- a *Logan* violation which is a violation of petitioner's sub-

56. Judge Norman Epstein, a named defendant in petitioner's instant federal lawsuit, and whose Superior Court judgment and actions petitioner is challenging on appeal, has this year (1987) been appointed to the Court of Appeal, assigned to the same division (Division Five of the Second Appellate District) that has been assigned to handle petitioner's appeal. Petitioner has requested the Clerk of the Appellate Court by letter to reassign her case to another division, and she has made a motion supported by a declaration and points and authorities for the disqualification of Division Five on due process grounds established by this Court in *Aetna Life Ins. v. Lavoie* 475 U.S. ____, 106 S.Ct 1580. Both efforts were summarily denied without explanation and without awaiting response by the County on the motion.

57."The complaint alleges that appellant was fraudulently deceived by the Superior Court judge (a named defendant in this case), by mislabeling his judgment 'interlocutory' on its face, thereby causing appellant to unwittingly 'waive' her right to a direct

stantive due process right of liberty[58] under the Fourteenth Amendment.

The Court of Appeal never talked about *Logan* whatsoever in its memorandum decision [App.A] The closest it came to discussing the hearing obligation with respect to the discharge was to admit that "A deprivation of employment may be a deprivation of property without due process", citing *Perry v. Sinderman*, and that "Due process requires a

appeal of that judgment. [Doc.30 p.49]. This fact was confirmed to the District Court herein. [See Rptrs.Trans. 3/10/86 p.32]. The complaint alleges that the higher State courts summarily denied relief sought by appellant in July and August of 1984. [Doc.30 p.49]. The relief sought was by extraordinary writ which was denied out of hand by the California Court of Appeal on July 10, 1984, and hearing denied by the California Supreme Court on August 8, 1984. ¶The complaint then alleges that appellant was left with no other choice in seeking a viable remedy but to turn to the Federal Court. [Doc.30 p.52]." [Opening Brief on appeal, pp 5-6].

58. "Davidson had been denied 'an *opportunity*... granted at a meaningful time and in a meaningful manner'... 'for [a] hearing appropriate to the nature of the case.' *Logan v. Zimmerman Brush Co.* 455 U.S. 422, 437... (citations omitted) (emphasis in original). Lacking a meaningful postdeprivation remedy in state court, Davidson was deprived of his liberty without due process of law." *Davidson v. Cannon*, (1986) 474 U.S. ____, 106 S.Ct. 668, 676-677

hearing." [59] The Court of Appeals then went on to make a false representation, knowing it to be false when made, and not cited to the record, regarding a hearing that was held.[60] The only hearing before the Civil Service Commission [a hearing officer] was

(J. Blackmun, dissenting). California also recognizes a liberty violation when one is subjected to arbitrary adjudicative procedures and unfair decisionmaking: "We therefore hold that the due process safeguards required for protection of an individual's statutory interests must be analyzed in the context of the principle that freedom from arbitrary adjudicative procedures is a substantive element of one's liberty. (citation) This approach presumes that when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudiced decisionmaking and in being treated with respect and dignity." *People v. Ramirez* (1979) 25 Cal.3d 260, 268, 158 Cal.Rptr.316, 599 P.2d 622.

59. "The hearing obligation of the County and its officials rests on a different footing with respect to the discharge, however. A deprivation of employment may be a deprivation of property without due process. See *Perry v. Sinderman*, 408 U.S. 593, 601-03 (1972). Due process requires a hearing. ..." [App.A p.A-6,7].

60. "Here Branson received a hearing before the Civil Service Commission at which the effect of the tax levies on Branson's refusal to work were addressed. This satisfied the requirement of due process in this situation. ..." [App.A p.A-7].

held October 9, 1984. Throughout the first amended complaint, petitioner refers to that hearing as a "sham proceeding based on a void judgment", or other indication that it was not a valid proceeding.[61] Moreover, besides the evidence showing the numerous allegations in the complaint[62] which diametrically opposes the memorandum decision of the Court of Appeals, petitioner summed up the situation in her Reply Brief to the County[63]

61. See e.g., Doc.30 (the first amended complaint) pages 31, 32, 50, 51, 52, 55, 73, 74, 75, 76, 77, 78, 79, 80, 84, 85.

62. See Fns. 40, 52A, 53, 57 and accompanying text.

63. "Had appellant received the full evidentiary hearing on the cause of her discharge, to which she was absolutely entitled by statutory grant creating the federally protected property interest, she could and would have shown by evidence (1) that she never received notice from the COUNTY of any federal tax levy; (2) that the federal levy documents (attached to Mr. Allen's declaration) are facially incorrect and cannot apply to appellant; (3) that the COUNTY had no authority or right to seize appellant's salary based on the facial information of the federal tax documents (attached to said declaration): (4) that information contained in Mr. Allen's declaration is inaccurate, incorrect, and patently false. ¶However, the basic and guaranteed right to this full hearing was summarily denied by the COUNTY, with the aid of the State courts in ignoring appellant's

giving the Court of Appeals ample notice of the fact that the material submitted by the County, and upon which the Court of Appeals solely relies in presenting its memorandum decision totally "wiping out" petitioner's federal case, is not undisputed or even accurate according to the record. Petitioner

evidence and demands and upholding summary-judgment type decisions by the COUNTY, in violation of *Logan*, a federal violation. ¶Appellant has established a prima facie case showing that she was fully justified for the conduct upon which the charges against her were based in her discharge, by the fact that the COUNTY fraudulently concealed the fact of a federal tax levy from appellant and from the record. It was not until after the belatedly-alleged federal tax levy took place that appellant became absent from work because she was not informed by the COUNTY of the disposition of her entire salary which she had already earned by past performance as an employee. This federal tax levy against appellant's salary was revealed for the first time on May 21, 1985, two years after the alleged levy took place, and a year-and-a-half after the discharge itself became effective. At no time prior to that date was there anything whatsoever discussed about a federal tax levy on appellant's salary, despite the fact that a major issue raised by appellant throughout the discharge proceedings was the illegal seizure of her entire salary by the COUNTY without explanation." [Reply Brief (to the County) pp 11-12]. The illegal seizure of petitioner's (appellant's) entire paycheck was also alleged in the complaint. Compare the information in this footnote with the Court of Appeals memorandum decision in this case. [App.A]

further pointed out to the Court of Appeals that even Judge Epstein himself was questioning the validity of his previous decision based on the evidence before him.[64] Eight months after the hearing which the Court of Appeals stated in its decision "addressed the effect of the tax levies on Branson's refusal to work" and that "this satisfied the requirement of due process", Judge Epstein stated (1) that he was concerned that there was no full disciplinary hearing; (2) that there remains a question [on June 10, 1985, eight months after the hearing that was held] whether the discipline is justi-

64. "The fact of the concealment by the COUNTY of a federal tax levy against appellant's salary is borne out by the fact that the entire administrative record is devoid of anything relating to a federal garnishment, as shown by 'EXHIBIT A' attached to Doc.52 herein. In briefing this matter in opposition to the COUNTY's motion to dismiss, appellant attached an excerpt of the transcript of proceedings before defendant EPSTEIN which took place on June 10, 1985, indicating defendant EPSTEIN's remarks on the

fied without having held a full hearing;[65] and (3) that this [June 10, 1985] was the first time Judge Epstein saw any reference to a federal garnishment.[66]

The Ninth Circuit, in an en banc decision,

record that that was the first time anything was mentioned about a federal garnishment (tax levy). (See Doc.52 pp 38-39)." [Reply Brief p.13].

65. "First, as one of my questions at the end of the last hearing, I am sure I indicated that I am concerned about the fact that there apparently was never any disciplinary hearing. There was a Skelly hearing, which I think was a valid hearing with one reservation that I will get to. But there never was a full hearing in the case. And the County is relying on a narrow exception to the rule that requires such a hearing in order to dismiss someone for cause. I had some questions at the last proceeding about that. The County has responded. [NOTE: The County responded with the same basic material as that relied on by the Court of Appeals herein, including the declaration of Arthur Allen]. I believe a question remains as to whether the discipline is justified in this case with that short cut, as it were, of not having a full hearing." [Doc.52 p.38, Judge Epstein speaking].

66. "I have looked at the material that has come back. [Arthur Allen's declaration, etc.] The material that I had before me then was replete with references, particularly the Skelly proceeding, to the garnishment by the Franchise Tax Board, and that petitioner had ample notification of that situation. But this was the first time that I recall seeing the references to a federal garnishment in addition. ..." [Doc.52 pp 38-39, Judge Epstein speaking].

established the criteria for initially evaluating the sufficiency of a complaint under §1983.[67] The first step is to examine the complaint to see if the two essential elements for a §1983 claim are alleged. Once that is affirmatively established, the claim is further analyzed according to *Parratt* (random, unauthorized, and unforeseeable deprivations), *Logan* (foreseeable deprivations by established state procedures and policies), and *Hudson* (an expansion of *Parratt* to include intentional deprivations where no established pre-deprivation process exists).[68]

67. "In any §1983 action, the first question is whether §1983 is the appropriate avenue to remedy the alleged wrong. We reach the issue of these defendants' liability only if we find that the two essential elements to a §1983 action are present: (1) the defendants acted under color of law, and (2) their conduct deprived [plaintiff] of a constitutional right. 42 U.S.C. §1983." *Haygood v. Younger*, (CA9th en banc 1985) 769 F.2d 1350, 1353-4.

68. "The law in this circuit and elsewhere is controlled by the Supreme Court opinions in *Parratt v. Taylor* (citation), *Logan v. Zimmerman Brush Co.*, (citation), and *Hudson v. Palmer* (citation). Those three cases shed recent light upon any analysis of claims under §1983." *Haygood, supra*, 769 F.2d at 1352.

Petitioner's case involves a discharge from civil service employment. Discharge procedures are "established state procedures" controlled by a set of civil service rules. Civil service generally provides a state-created property interest, as it did in petitioner's case, which brings into play the federal due process standards set forth in *Logan*. [See Fns. 43 and 49 with accompanying text, ante.] When the procedural due process established under federal standards is not followed by the state, a destruction of the property interest occurs (i.e., a *Logan* violation) which is a substantive due process violation of liberty. [Fn.58].

Therefore, under the *Logan* analysis, as would apply to the facts in petitioner's case, the Court of Appeals was faced with a two-part inquiry:[69] (1) was petitioner deprived

69. "At the outset, then, we are faced with what has become a familiar two-part inquiry: we must determine whether Logan was deprived of a protected interest, and, if so, what process was his due." *Logan, supra*, 455 U.S. at 428.

of a protected property interest; and (2) if so, what process was her due.

The Ninth Circuit not only refused to analyze petitioner's complaint under the *Logan* analysis, but it did not analyze it under *Parratt* or *Hudson* either, despite the fact that all §1983 claims are analyzed under those three cases, as the law of the Ninth Circuit is established. [Fn.68] The Ninth Circuit failed to follow the doctrine of "stare decisis" [Fns. 19, 51] in approaching petitioner's appeal.[70] The law is already established that on an appeal from a 12(b)(6) dismissal, appellate inquiry is "limited to the content of the complaint" for the purpose of "test[ing] the legal sufficiency of the complaint." [Fn.46] The scope of review in this case "does not allow [the Court] to

70. "To address the merits of Branson's appeal, we should focus primarily on the allegations against the County and its officials and then deal with the charge against Judge Epstein and United Pacific." [App.A p.A-5].

reach the merits of [any] issue." [Fn.46] Furthermore, the entire memorandum decision [App.A] is based on false and fraudulent statements [Fn.18 and accompanying text] which conflict with the facts shown on the record. Therefore, it is clear that the Court of Appeals has intentionally defrauded petitioner out of a federal remedy to vindicate her constitutional rights.

3. To compel the Court of Appeals to perform its duty to address petitioner's third issue on appeal (judicial immunity) on the basis of the material facts pled in the first amended complaint.

The third question to this Court deals with the issue of "judicial immunity" which question was totally avoided by the Court of Appeals. The Court's cryptic statement

in its memorandum is absolutely frivolous![71] It fails to address the facts of this case.

Petitioner has alleged that Judge Epstein acted outside the scope of the statutorily-invoked jurisdiction [72] which is subject-matter jurisdiction.[73] Appellant has amply argued the issue, citing law and the record, in her appellate briefs (opening and reply). Furthermore, petitioner filed a separate document entitled "Plaintiff's Opposition to Defendant Epstein's Points & Authorities In Re The *Ashelman* Case". [Doc.48]. That

71. "The claim that Judge Epstein violated Branson's constitutional rights is without merit. Judge Epstein is immune from liability. 'Judges are immune from damage actions for judicial acts taken within the jurisdiction of their courts.' *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc)" [App.A p.A-8].

72. See e.g. Doc.30 pp 25, 28, 30, 44, 45, 47, 48, 55.

73. "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. ...¶¶...The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority

document reminds counsel and the courts that petitioner is not resting her case regarding judicial liability/immunity on *Ashelman*. Yet, that is the case solely cited by the Court of Appeals. The Court has addressed none of petitioner's citation to law on the issue, nor the facts of the case.

Having alleged that Judge Epstein acted outside the scope of subject-matter jurisdiction, any statement amounting to a counter-allegation on behalf of defendant Epstein that he acted within the jurisdiction of his court, must be plead as an affirmative defense by way of answer. Such a statement does not overcome petitioner's allegations. The issue becomes one of fact to be decided by a jury.[74] The statements made by the

vested in it by laws in regard to the subject-matter of the cause. *Cooper v. Reynolds*, (1870) 77 U.S. 308, 316, 317; 10 Wall. 308, 19 L.Ed 931." [Doc.48 p.5].

74. "Whether or not defendant EPSTEIN can rely on judicial immunity depends upon what he has done, not on who he is or what position he holds. Questions about what was done are adjudicative facts which must be tried by jury; therefore this question must

Court of Appeals in its memorandum is at best an affirmative defense on behalf of defendant Epstein. It is not a court decision, since it does not address the issue according to the law and facts of this case. The issue remains unaddressed by any court.

CONCLUSION

This Court has stated that the very purpose of §1983 is to interpose the federal courts between the States and the people, as guardians of the people's federal rights.[75]

The question now is "Where is the remedy today? In 1871 the political corruption had covered the state courts, making them

proceed to trial on the merits. '[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant. *Briscoe v. LaHue* (1983) 460 U.S. 325, 342..." [Doc.48 p.5].

75. "The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights--to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' *Ex parte Virginia*, 100 U.S. at 346." *Mitchum v. Foster*, 407 U.S. 225, 242.

powerless to stop deprivations of federally protected rights.[76] Today, the level of political corruption has risen to inundate the federal courts as well --at least through the level of the United States Court of Appeals for the Ninth Circuit as has been shown by the record in this case.

This Supreme Court of the United States is the "Last Frontier" of the justice system at which petitioner may still seek a remedy for redress for the destruction of her federally-protected rights. After that, where do we go to have our legal issues redressed by the evidence?

Barbara J. Brosnahan
September 15, 1987
(corrected & Re-submitted 10/30/87)
BJB

76. "Proponents of the legislation (Civil Rights Act) noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum v. Foster, supra*, 407 U.S. at 240.

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

BARBARA J. BRANSON, being first duly sworn, deposes and says:

That on October 30, 1987, she served three copies of the within corrected PETITION on all parties by placing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

(Three copies each to the following)

UNITED STATES COURT OF APPEALS
For the Ninth Circuit
P.O. Box 547, 7th & Mission Sts.
San Francisco CA 94101

HON. JOHN F. KILKENNY
Circuit Judge, Ninth Circuit
P.O. Box 547, 7th & Mission Sts.
San Francisco CA 94101

HON. JOSEPH T. SNEED
Circuit Judge, Ninth Circuit
P.O. Box 547, 7th & Mission Sts.
San Francisco CA 94101

HON. DIARMUID F. O'SCANNLAIN
Circuit Judge, Ninth Circuit
P.O. Box 547, 7th & Mission Sts.
San Francisco CA 94101

SOLICITOR GENERAL
Department of Justice
Washington D.C. 20530

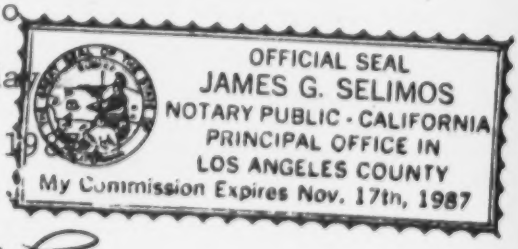
LOS ANGELES COUNTY COUNSEL
Albert D. Kelly, Deputy
500 West Temple St., Room 648
Los Angeles CA 90012

BOOTH, MITCHEL, STRANGE & SMITH
Attorneys for United Pacific
3435 Wilshire Blvd., 30th Floor
Los Angeles CA 90010

Dated: October 30, 1987

Barbara J. Branson
BARBARA J. BRANSON

Subscribed and sworn to before me this 30th day of October, 1987



James G. Selimos
Notary Public in and for
said County and State

My Commission expires Nov. 17, 1987

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

F I L E D

BARBARA J. BRANSON,	)	APR 29 1987
	)	
Plaintiff-Appellant,	)	No. 86-5841
	)	
v.	)	DC#
	)	CV 85-2318-WJR
COUNTY OF	)	
LOS ANGELES, et al.,	)	MEMORANDUM*
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding
Submitted March 19, 1987**

Before: KILKENNY, SNEED, and O'SCANNLAIN,
Circuit Judges.

Branson seeks to convert a dispute growing out of her discharge by the County of Los Angeles into a federal case under 42

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R.21.

**The panel finds this case appropriate for submission without argument pursuant to 9th Cir.R.3(f) and Fed.R.App.P.34(a).

U.S.C. §1983. Proceeding pro se, she failed in the district court, and we affirm.

[p.2]:

I

FACTS

Branson worked as a legal secretary in the Los Angeles County District Attorney's Office. Both the State of California and the United States, through their appropriate agencies, ordered tax levies on Branson's wages. She did not believe she owed the taxes; the County, however, complied with the levy orders. Being deprived of a portion of her salary as a result of these levies, Branson refused to work. In due course the County gave warning that if she did not return to work she would be terminated. Conferences followed but with no result. She did not return to work. She was discharged effective December 30, 1983.

Thereafter commenced the legal saga of which this appeal is a part. Failing to

obtain a hearing before the County Civil Service Commission, she turned to the Superior Court of the State of California to obtain administrative mrndamus, reinstatement, and back pay. Judge Epstein of the Superior Court limited the relief he granted to requiring the Commission to hold a limited hearing to determine the appropriateness of Branson's discharge. Such a hearing was held pursuant to Judge Epstein's order and the Commission upheld the discharge. Branson returned to the Superior Court and sought to vacate Judge Epstein's writ of mandate.

The status of this effort is unclear. Apparently Branson "crossed the street" to the federal district court and filed this action against the County of Los Angeles, United Pacific Insurance Co., the bonding company with respect to County

[p.3]:

officials, several County officials, and Judge Epstein. The complaint centered on the

discharge and alleged numerous constitutional wrongs and statutory violations. The district court dismissed the complaint entirely with leave to amend, save as to the claim against United Pacific, which it dismissed with prejudice.

Branson submitted an amended complaint against all parties, except United Pacific, alleging substantially the same violations as did the initial complaint. After a hearing the district court dismissed the action. Branson appealed. In connection with this appeal several motions to this court must also be addressed. One of these is Branson's request for sanctions against United Pacific because of its motions to dismiss Branson's first complaint and to dismiss Branson's appeal; and finally there is the motion of United Pacific seeking its fees for a frivolous appeal by Branson.

We shall deal with Branson's appeal first and then turn our attention to the motions.

II

BRANSON'S APPEAL

To address the merits of Branson's appeal, we should focus primarily on the allegations against the County and its officials and then deal with the charge against Judge Epstein and United Pacific. Finally, we will consider whether Branson should be entitled to file a second amended complaint.

[p.4]:

A. County and Officials

Neither the County nor its officials did wrong in recognizing the administrative levy on wages under federal law. See 26 U.S.C. §§ 6331-6332; United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985); Phelps v. United States, 421 U.S. 330, 334 (1975). Upon levy the wages become constructively possessed by the United States.

With respect to the state tax levy, this court should not entertain a section 1983 action challenging that action so long as

state remedies are adequate. See Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 116 (1981); Miller v. City of Los Angeles, 755 F.2d 1390, 1391 (9th Cir.), cert. denied, 106 S.Ct.408 (1985). Branson made no showing that state remedies are inadequate.

We would hold, were we required to do so, on the basis of United States v. Heck, 499 F.2d 778, 792-93 (9th Cir.), cert. denied, 419 U.S. 1088 (1974), that neither levy need be preceded by a "pre-seizure hearing"; however, we are not required to do so because the responsibility for providing such a hearing should it be required would rest upon the state and federal government and not upon the County and its officials which in no event would be liable for the constitutional wrongs of others.

The hearing obligation of the County and its officials rests on a different footing with respect to the discharge, however.

A deprivation of employment may be a deprivation of property without due process. See Perry v. Sindermann, 408 U.S.

[p.5]:

593, 601-03 (1972). Due process requires a hearing. Here Branson received a hearing before the Civil Service Commission at which the effect of the tax levies on Branson's refusal to work were addressed. This satisfied the requirement of due process in this situation. While this same result might properly be reached, at least with respect to some defendants, by application of either res judicata, collateral estoppel, or the prohibition against splitting a cause of action, see Punton v. City of Seattle, 805 F.2d 1378, 1381-82 (9th Cir. 1986), the exploration of these somewhat complicated doctrines should be avoided where the absence of an unconstitutional deprivation of property is quite clear. We need not look for eggs already in the nest before us.

B. Claim Against Judge Epstein

The claim that Judge Epstein violated Branson's constitutional rights is without merit. Judge Epstein is immune from liability. "Judges are immune from damage actions for judicial acts taken within the jurisdiction of their courts." Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc).

C. Claims Against United Pacific

Branson challenges the dismissal with prejudice of claims against United Pacific and seeks to rename the bonding company in her first amended complaint. The dismissal was proper. Inasmuch as neither the County nor the named officials are liable to Branson, neither is United Pacific. Renaming United Pacific would be a futile act. [p.6]:

D. Further Amendment of Branson's Complaint

Branson has conclusively demonstrated that a second amended complaint would be

both futile and vexatious.

III.

MOTIONS

Since there will be no remand of this case, the disqualification of Judge Rea is a moot issue.

No sanctions should be imposed on United Pacific because of vexatious multiplication of proceedings. Its motion to dismiss Branson's first complaint was not without merit, and its mistaken motion to dismiss the appeal is insignificant when compared with the cost to the public of this litigation initiated by Branson.

Nonetheless, in keeping with our expansive tolerance of pro se litigants, we deny United Pacific's motion seeking attorneys fees from Branson.

AFFIRMED.

E N T E R E D

OCT 4 1985

F I L E D

OCT 2 1985

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BARBARA J. BRANSON, Plaintiff, vs. COUNTY OF LOS ANGELES, et al., Defendants.	CV 85-2318-WJR(G) ORDER VACATING REFERENCE TO MAGISTRATE AND DISMISSING PLAINTIFF'S COMPLAINT

Plaintiff's Motion to Vacate the Order of Reference came on for hearing on Sept. 16, 1985. At the same time, the Court considered the Report and Recommendation of Magistrate Geffen, lodged Aug. 22, 1985, recommending dismissal of the plaintiff's complaint. The Court also considered de novo all of the motions to dismiss made by the defendants. Plaintiff appeared in propria persona, and all defendants were represented by counsel.

Having considered the motion to vacate the reference, the oppositions to said motion, the magistrate's report and recommendation, the motions to dismiss, the opposition to these motions to dismiss, the oral arguments of counsel, and the entire record of this case, the Court hereby ORDERS as follows:

[p.2]:

1. the order of reference is VACATED. All matters in this case, with the sole exception of discovery matters, will henceforth come before this Court and not be referred to the magistrate;

2. the Court takes NO ACTION with regard to the magistrate's Report and Recommendation, lodged Aug. 22, 1985. The subject matters of this report were the defendants' motions to dismiss, which have been considered de novo by the Court, rendering the magistrate's report moot;

3. defendant United Pacific Insurance

Company's Motion to Dismiss is GRANTED. The plaintiff's complaint is DISMISSED WITHOUT LEAVE TO AMEND as regards United Pacific. Plaintiff has failed to state any claim against United Pacific. United Pacific has conclusively proven that no claim can be stated against it;

4. the other defendant's motions to dismiss are GRANTED. Plaintiff's complaint is DISMISSED WITH SIXTY DAYS LEAVE TO AMEND.

IT IS SO ORDERED.

DATED: 10-2-85

WILLIAM J. REA

UNITED STATES DISTRICT JUDGE

DEWITT W. CLINTON,
County Counsel
DONOVAN MAIN, Assistant
County Counsel
ALBERT D. KELLY, Senior
Deputy County Counsel
500 West Temple Street
Room 648
Los Angeles, California
90012

Telephone: (213)974-0691

L O D G E D

MAR 14 1986

F I L E D

MAR 26, 1986

E N T E R JS-6

Attorneys for Defendants, COUNTY OF LOS ANGELES, MICHAEL D. ANTONOVICH, DEANE DANA, KENNETH F. HAHN, PETER F. SCHABARUM, EDMUND D. EDELMAN, ROBERT H. PHILIBOSIAN, JAMES A. BASCUE, BILLY D. WEBB, ANN BURNETT, ERNEST E. GOODMAN, N. KEITH ABBOTT, GEORGE S. NOJIMA, TOM SALATA, CECILIA M. SANDOVAL, JOHN C. BOLLENS, ARNOLD L. FABER, JOHN H. LARSON, DE WITT W. CLINTON, JOE BEN HUDGENS, MARK H. BLOODGOOD, NORMAN L. EPSTEIN, UNITED PACIFIC INSURANCE COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BARBARA J. BRANSON,

Plaintiff,

vs.

COUNTY OF LOS ANGELES, MICHAEL D. ANTONOVICH, DEANE DANA, KENNETH F. HAHN, PETER F. SCHABARUM, EDMUND D. EDELMAN, ROBERT H. PHILIBOSIAN, JAMES A. BASCUE, BILLY D. WEBB, ANN BURNETT, ERNEST E.	) Case No. 85-2318-WJR(G)) ~~PROPOSED~~ ORDER) OF DISMISSAL

[p.1 continued]:

GOODMAN, N. KEITH)
ABBOTT, GEORGE S.)
NOJIMA, TOM SALATA,)
CECILIA M. SANDOVAL,)
JOHN C. BOLLENS,)
ARNOLD L. FABER,)
JOHN H. LARSON,)
DE WITT W. CLINTON,) E N T E R E D
JOE BEN HUDGENS,)
MARK H. BLOODGOOD,) MAR 27 1986
NORMAN L. EPSTEIN,)
UNITED PACIFIC)
INSURANCE COMPANY,)
)
Defendants.)

This cause came on for hearing on March 10, 1986 on defendant Norman L. Epstein's motion to dismiss, defendant United Pacific Insurance Company's motion to dismiss, and the motion to dismiss of the remaining defendants. Plaintiff was present and

[p.2]:

appeared in propria persona. All defendants were represented by counsel. Having heard oral argument by plaintiff, in propria persona, and counsel for defendants, and being fully advised, it is ORDERED as follows:

1. The motion to dismiss of defendant Norman L. Epstein is granted because seventy-one (71) of the ninety-two (92) claims in the complaint do not name or allege facts which relate to defendant Epstein, the remaining twenty-one (21) claims fail to state a claim upon which relief may be granted, and the first amended complaint fails to set forth a short plain statement of the claims as required by Rule 8 of the Federal Rules of Civil Procedure;

2. The motion to dismiss of defendant United Pacific Insurance Company is granted because the first amended complaint fails to state a claim upon which relief may be granted, and defendant United Pacific Insurance Company, is not named as a defendant in plaintiff's first amended complaint;

3. The motion to dismiss of all remaining defendants is granted because the first amended complaint is vague and unspecific, it fails to state a claim upon which relief

may be granted in each of the ninety-two claims plead, and it fails to set forth short, plain statements of the claims as required by Rule 8 of the Federal Rules of Civil Procedure, and it fails to state with particularity the circumstances constituting fraud and conspiracy as required by Rule 9 of the Federal Rules of Civil Procedure; [p.3]:

and the first amended complaint be and it is hereby dismissed without leave to amend and that the action be and it is hereby dismissed with prejudice.

Dated: March 26, 1986 WILLIAM J. REA

UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

F I L E D

JUN 23 1987

BARBARA J. BRANSON, Plaintiff-Appellant,	)	No. 86-5841
v.	)	DC# CV 85-2318-WJR
COUNTY OF LOS ANGELES, et al., Defendants-Appellees.	)	ORDER

Before: KILKENNY, SNEED, and O'SCANNLAIN, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.

P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

[No signature or name]

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

(Relevant portions quoted)

Fifth Amendment (Due Process Clause)

No person shall...be deprived of life, liberty, or property, without due process of law;....

Fourteenth Amendment (Due Process Clause)

Section 1. .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;...

Title 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, Territory, or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Federal Rule of Civil Procedure 12(b)(6)

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted,.... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to

state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Federal Rule of Civil Procedure 15(a)

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party;

and leave shall be freely given when justice so requires.

Federal Rule of Civil Procedure 56(c) and (g)

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

* * *